



Jo Ann Pate
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July 1, 2019

Honorable Ken Paxton
Texas Attorney General
ATTN: Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Certified Mail No.: 7004 1160 0006 9802 9638

Re: City of Fort Worth Public Information Request No. W086411 from Taylor Amarel
Request for A Named Individual's Emails Including Specific Words

Dear Attorney General Paxton:

On June 10, 2019, the City of Fort Worth (the "City") received a written request from Taylor Amarel (the "requestor") for a named individual's emails involving specified words. Exhibit "A" contains a certification of the date the City received the request. A copy of the request is included as Exhibit "B." On June 24, 2019, the City requested a ruling from your office.

The City will release the majority of the responsive information. However, the City believes that the remaining responsive records are excepted from disclosure under sections 552.103 and 552.107 of the Texas Government Code. Therefore, the City is seeking a ruling from your office in accordance with section 552.301 of the Texas Government Code. Exhibit "C" contains a representative sample of the information at issue.

The responsive information pertains to pending litigation.

Section 552.103 of the Texas Government Code provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

OFFICE OF THE CITY ATTORNEY

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TEX. GOV'T CODE § 552.103(a), (c).

Your office has repeatedly held that a governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. The courts have determined that the test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both parts of the test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). Your office has held that to establish that litigation is reasonably anticipated, a governmental body must provide your office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Texas Government Code § 552.103 and that litigation is “reasonably likely to result”).

In this instance, the requestor is seeking information that relates to a pending lawsuit that is currently filed and pending in Dallas County. The case was pending at the time of the request. The records sought consist of emails that provide the attorney's theory of the pending case, defense strategies, and updates to her client. The City contends that the records attached and represented by Exhibit “C” are related to the pending litigation for purposes of section 552.103(a). Because the City has demonstrated that litigation was pending on the date this request was received, and has explained how the information at issue relates to the litigation, the City asserts that the requested records submitted as Exhibit “C” may be withheld pursuant to section 552.103 until such time as litigation is no longer anticipated.

Information within the attorney-client privilege is confidential and must not be disclosed.

The City contends that some of the enclosed documents, which are marked under Section 552.107 of the Texas Government Code and Rule 503 of the Texas Rules of Evidence, may be withheld pursuant to Section 552.107(1) of the Texas Government Code and Rule 503 of the Texas Rules of Evidence.

Section 552.107 protects information that comes within the attorney client privilege. The test for determining whether information is protected under the attorney client privilege under

Section 552.107 is the same as the test under Texas Rules of Evidence 503. First, a governmental body must demonstrate that the information constitutes or documents a communication. Open Records Decision 676 at 7 (2002). Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Fourth, the attorney-client privilege applies only to a confidential communication, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5), (b)(1).

Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because a client may elect to waive the privilege at any time, your office has also held that a governmental body must explain that the confidentiality of a communication has been maintained. Your office has also stated that Section 552.107(1) and Rule 503 generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein); *In re Valero Energy Corp.*, 973 S.W.2d 453, 457 (Tex. App.—Houston [14th Dist.] 1998, orig. proceeding) (privilege attaches to complete communication, including factual information).

The submitted records consist of emails regarding ongoing litigation that discuss theories of the case, defense strategies, and updates from the assigned Senior Assistant City Attorney to her clients. The records were created and are maintained in the course of providing professional legal services to the City of Fort Worth. The record includes communications to and from attorneys for the City, acting in their capacities of providing professional legal services, and employees and officers of the City acting in their official capacities as clients or client representatives. These communications were made "for the purpose of facilitating the rendition of professional legal services" to the client. Finally, those parties involved at the time the information was communicated intended the information to be kept confidential and that confidentiality has been maintained since the information was communicated. Because all of the elements of the attorney-client communication privilege are present and the privilege has not been waived and because the records constitute confidential information which the City Attorney and her Assistant City Attorneys are prohibited from disclosing under Rule 1.05 of the Texas Disciplinary Rules of Professional Conduct, the City contends that the submitted records are excepted from disclosure in their entirety pursuant to Section 552.107, Rule 503 and the attorney work product doctrine.

Honorable Ken Paxton
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July 1, 2019
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Respectfully submitted,


Jo Ann Pate
Assistant City Attorney

Enclosures

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